

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JAMES W. MCCULLEY,

Plaintiff,

- against -

N.Y.S. DEPARTMENT OF ENVIRONMENTAL
CONSERVATION et. al.

Defendants.

05-CV-00811

(LEK/DRH)

Reply Affidavit in
Support of Motion
to Vacate Entry of
Default

STATE OF NEW YORK :
:SS.:
COUNTY OF ALBANY :

LAWRENCE A. RAPPOPORT, being duly sworn, deposes a says:

1. I am a duly licensed attorney in the State of New York and an Associate Attorney in the Office of Andrew M. Cuomo, Attorney General of the State of New York, counsel for defendants. I am familiar with the facts and circumstances underlying defendants' October 29, 2009 motion to vacate the Clerk's Certificate of Entry of Default in this action, Docket Entry No. 51. I am also familiar with defendants' October 30, 2009 answer to the original complaint in this matter, Docket Entry No. 54. I submit this affidavit in reply to the November 19, 2009 affidavit of plaintiff's counsel opposing defendants' motion, Docket Entry No. 59.

2. Pursuant to Notice filed November 13, 2009, the hearing on defendants' motion has been reset for December 18, 2009 before Hon. Senior Judge Lawrence E. Kahn. Plaintiff's October 29, 2009 motion for a default judgment returnable December 4, 2009 (Docket Entry No.

53), which plaintiff filed after defendants filed their motion, is also pending before Senior Judge Kahn.

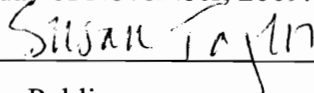
3. Counsel's contention in ¶ 16 of his November 19, 2009 opposing affidavit that defendants did not submit any evidence showing that they have meritorious defenses in this action is unavailing. The original complaint in this matter, Docket Entry No. 1, on its face, establishes defendants' entitlement to assert 11th Amendment and other immunities as defenses to all of the relief sought in this action. The original complaint seeks compensatory and punitive monetary damages, injunctive, and declaratory relief against a state agency and state employees and officers. Allegations against the individual state defendants in the original complaint do not differentiate between their actions purportedly undertaken in their official capacities from actions purportedly undertaken in their individual capacities.

4. Also, the original complaint sought to enjoin defendants from proceeding with an administrative enforcement proceeding against him. The Commissioner's May 19, 2009 administrative Decision and Order dismissing the administrative complaint, Exhibit A of defendants' answer (Docket Entry No. 54), conclusively establishes that the allegations in the original complaint seeking to enjoin the hearing are moot.

5. Therefore, the Clerk's Certificate of Entry of Default should be vacated.


Lawrence A. Rappoport

Sworn to before me this
30th day of November, 2009.



Notary Public

SUSAN L. TAYLOR
Notary Public, State of New York
No. 02TA6020240
Qualified in Rensselaer County
Commission Expires March 1, 2011